97CV07593-DGT-MO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

Marine Corp Cargo, Inc.,

Plaintiff,

- against -

Raymur Corp,

Defendant.

----------X

MEMORANDUM
AND ORDER

CV-97-7593(DGT)

TRAGER, District Judge:

Plaintiff, a shipping company, sued defendant, a shipper, to collect on unpaid bills incurred in the course of business transacted between the parties. Defendant did not answer or appear in opposition to plaintiff's complaint and plaintiff was granted a default judgment on March 20, 1998, pursuant to F.R.Civ.P. 55. Subsequently, defendant, with counsel, moved to vacate the judgment, arguing that it had, in fact, paid the bills in question. Oral argument was held on July 14, 1998, at which time defendant was explicitly instructed to produce documentation to support its claim of payment. By letter dated August 10, 1998, defendant submitted its supporting evidence. Because this evidence, however, is bereft of documentation showing payment of the accounts allegedly owed, defendant has failed to demonstrate that it has a meritorious defense and, therefore, its motion to vacate the default judgment is denied.

CM

Background

Prior to the July 14, 1998 oral argument, defendant had been instructed to gather documentary evidence supporting its claim that it had paid the bills underlying the default judgment. Defendant produced only copies of two checks paid to satisfy accounts on plaintiff's list of open accounts. After reviewing plaintiff's documentation, however, it became clear that defendant's checks had, in fact, resulted in the appropriate credits, but, nevertheless, the two accounts had been only partially satisfied and a small outstanding balance remained due in each.

An examination of these two checks revealed that it was defendant's practice to write in the checks' memo section the number of plaintiff's account, or corresponding bill of lading number, that the check was intended to satisfy. Since plaintiff provided the court with a list of the outstanding account numbers, and wrote in next to them the corresponding bill of lading numbers, defendant had simply to produce cancelled checks bearing the relevant numbers to prove it had already paid the allegedly delinquent bills.

At the hearing, plaintiff argued that even if defendant produced checks with the relevant account numbers written in the memo, this designation would not necessarily indicate that the specified account had been satisfied because plaintiff routinely applied checks paid to one account to other accounts that had been owing for a longer period of time. In fairness to

defendant, the court rejected this argument. Plaintiff had ample opportunity to organize its records and come to the oral argument prepared with a comprehensive list of open accounts. Accordingly, the court ruled that plaintiff would be held to the open account list it produced at the July 14, 1998 oral argument, and if defendant brought forward checks indicating payments to those accounts, plaintiff would not be permitted to argue that the money was still owed, because the particular check had been applied to a different bill of lading.

Concededly, defendant's records were not maintained in an ideal manner and, in all likelihood, defendant does not possess records of the payments it contests. Nevertheless, defendant's principal and her attorney were explicitly instructed to contact the appropriate banks and request either copies of cancelled checks or, alternatively, withdrawal records that would indicate that cash had been removed from an account at or near the time a payment had allegedly been made. The cash withdrawals might constitute circumstantial evidence of payment by bank check, mail order or some similar form of payment. Defendant's task would not be difficult as banks are required to maintain copies of checks for at least several years and the disputed payments had all occurred within a period of six months in late 1995 and early 1996, making defendant's inquiry manageable in scope.

Thus, at the close of oral argument, defendant was granted an adjournment until August 11, 1998, during which it should make the necessary inquiries and compile documentation in support of

its contention that the disputed bills had, in fact, been previously paid.

Discussion

The Second Circuit "has expressed on numerous occasions its preference that litigation disputes be resolved on the merits, not by default." Cody v. Mello, 59 F.3d 13, 15 (2d Cir. 1995). See e.g., Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 95 (2d Cir. 1993); Traguth v. Zuck, 710 F.2d 90, 94 (2d Cir. 1983); Meehan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981). It has recognized that "'dismissal is "a harsh remedy to be utilized only in extreme situations."'" Colon v. Mack, 56 F.3d 5, 7 (2d Cir. 1995)(quoting Jackson v. City of New York, 22 F.3d 71, 75 (2d Cir. 1994)(quoting Harding v. Federal Reserve Bank of New York, 707 F.2d 46, 50 (2d Cir. 1983)(quoting Theilmann v. Rutland Hosp., Inc., 455 F.2d 853, 855 (2d Cir. 1972)))).

Federal Rules of Civil Procedure 55(c) and 60(d) allow for vacatur of default judgments "[f]or good cause shown the Court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)," and "[o]n motion and upon such terms as are just, the Court may relieve a party or party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; any other reason justifying relief from the operation of the judgment."

Courts have gone beyond the literal wording of these rules and established certain criteria which should be considered in deciding whether the designated standards have been satisfied. These criteria include: (1) whether the default was willful; (2) whether defendant has a meritorious defense; and (3) the level of prejudice that may occur to the non-defaulting party if relief is granted. See e.g., Securities and Exch. Comm'n v. McNulty, 137 F.3d 732, 738 (2d Cir. 1998). In this case, it would be unfair to impose on plaintiff the burden of additional litigation when defendant, even after a number of opportunities to do so, has completely failed to come forward with a semblance of proof that it has a meritorious defense.

By letter dated August 10, 1998, defendant submitted its supporting evidence. This letter, however, did not include the documentation that defendant had been directed to gather. Nor was any excuse offered for defendant's failure to do so. Instead, defendant reiterated numerous arguments that had been previously rejected. Specifically, defendant argued that: (1) even if defendant ran "a sloppy business by way of accounting," plaintiff did so as well; (2) other shippers were accused by plaintiff of owing on invoices, but proved they had already paid "only because they were able to locate their records"; (3) plaintiff fired several employees responsible for its accounting; (4) defendant produced one check relating to an

account on plaintiff's list of those that are delinquent[1]; and (5) since plaintiff had not formally issued defendant credit and only released shipped goods after payment has occurred, the fact that all of defendant's shipments were delivered indicates that it had always paid.[2] None of these arguments responded to the

---

[1]The check that defendant attached has several different numerals written on its face, including one written at the top of the check that corresponds with an account listed by plaintiff as open. In the memo section, however, other account or lading numbers are listed and do not correspond to any account on plaintiff's list. It is unclear who wrote the number on the check's top, but since the court limited plaintiff's ability to argue that it had applied checks to accounts not placed on its list of delinquent accounts, it is equally fair to restrict defendant strictly to the account numbers written on the check's memo section. This limitation is especially appropriate because defendant has made clear that, as a matter of business practice, it used the check's memo section to communicate to plaintiff the account to which the check should be applied.

[2]It is clear that a shipper's goods may be released, even if payment has not been received by plaintiff and there is no formal credit agreement in effect, in several different situations. First, plaintiff is occasionally issued a check and releases goods based on that payment, but later discovers that the check has "bounced" due to insufficient funds. See Transcript of Oral Argument, July 14, 1998, p. 10, 13 ("they bounced checks to us on some of [the accounts]. So you are involuntarily giving people credit because the cargo is released against [the bounced checks]. . . We released goods from the time we got the check. As long as we were paid we released the goods. The check subsequently bounced."). Second, in the regular course of business, with numerous items of cargo shipped to myriad destinations, it is not uncommon for a shipment to get ahead of its payment, in which case it may nonetheless be released so as to avoid the disruption to shipping schedules that withholding the cargo could occasion. See id. ("There is a system, express release - in other words, a cargo can get ahead of [payment]. Even though you're not giving anybody huge amounts of credit,

issue at hand, the need for some proof of payment, and defendant admitted as much in the first paragraph of its letter, stating that "we are in agreement with your position that defendant should have maintained records to demonstrate that she paid the invoices in question. However, the difficulty is that defendant does not have all these records and for that reason defendant is in court."

The court recognizes that defendant maintained poor accounting records. Nevertheless, it is clear that, if defendant had made payments for the accounts claimed open, it could have collected some supporting evidence from its banks or elsewhere. Defendant's task of documenting its payments was made a great deal easier by the fact that as a business practice it wrote on its checks the account for which payment was being issued, and the relatively short period, six months, in which all the disputed payments, if made, would have occurred. Defendant was given an opportunity to contact its banks, but apparently made no such effort because defendant's letter does not even state that it had attempted to communicate with a bank.

---

once the cargo gets ahead of you involuntarily you're giving credit."). Thus, contrary to defendant's contentions, plaintiff's clients may be informally afforded credit and have their goods shipped and delivered when full and final payment has yet to be received by plaintiff. In any case, it seems intuitive that simply as part of effective business practice, a shipper may release goods ahead of payment (or check clearance) as a measure of goodwill for clients with whom it conducts business on an ongoing and frequent basis, or, in the case of newer clients, as a method of engendering an expanded business relationship.

Keeping in mind defendant's request that the court be "logical, open minded and fair in the assessment of this matter," and this court's general practice of granting motions to vacate default judgments, defendant's utter and complete failure to provide a shred of documentary evidence to show that it paid the disputed bills leaves the court no choice but to reject its motion. To hold otherwise and vacate the judgment on authority consisting of nothing more than defendant's oral assurances that it paid the disputed bills would surely not be "logical, open minded and fair [to plaintiff] in the assessment of this matter." Accordingly, defendant's motion to vacate the default judgment is denied.

Conclusion

For the reasons stated above, defendant's motion to vacate the default judgment is denied.

Dated: Brooklyn, New York
August 31, 1998

SO ORDERED:

David G. Trager
United States District Judge

Sent To:

Thomas V. Halley, Esq.
Halley, Calkins & Halley, P.A.
Attorneys for plaintiff
801 Brickell Avenue - 9th Floor
Miami, Florida 33131

G. Wesley Simpson, Esq.
Attorney for defendant
899 Linden Boulevard
Brooklyn, NY 11203